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IN THE

SUPREME COURT OF THE UNITED STATES

——— Term, 1968

No. 873

UNITED STATES OF AMERICA, - Plaintiff-Appellee.

versus

ETHEL M. BEAL, - - - Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

——— Term, 1968

No. ———

UNITED STATES OF AMERICA, - *Plaintiff-Appellee,*

v.

ETHEL M. BEAL, - - - *Defendant-Appellant.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

William H. Beck, Attorney on behalf of the Defendant-Appellant, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW.

The opinion of the United States District Court, Eastern District of Kentucky is not reported. The opinion of the Court of Appeals (Appendix A, *infra,* pp. 21-23) is attached.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 26, 1968 (Appendix A, *infra,* p.). The Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED.

1. Whether or not the appellant received a fair and impartial trial when one of the jurors, James S. Ledford, stated that at the time he was sitting as a juror in the instant case, that a pending controversy was now in process by the United States Government against said juror when in fact said investigation by the United States Treasury Department and the United States Government did tend to prohibit the said juror from giving a fair and impartial decision in the instant case due to the pressure by same? Did the same James Ledford, a juror in the instant case, truthfully answer the question on page 29 of the Transcript of the Voir Dire Examination of the Jury by shaking his head in the negative when asked, "Are you acquainted with Mrs. Beal, the defendant? The Court: Have you ever heard of this case before that you recall or read of it or anything? Mr. Ledford: (Shaking his head in the negative)," when in fact, Mr. James B. Ledford, the juror, registered into and was a guest in the small hotel operated by said defendant under date of May 14, 1967 and in Room No. 24, 9:45 p.m., at a rate of $5.00 per day, said registration card was signed by said James B. Ledford, Carlisle, Kentucky and that said juror was personally acquainted with the defendant at the time of trial.

2. Did the United States and the Court err in the introduction of evidence of the years prior to 1953 by the testimony of Solly Hall, 1954; W. B. Walker, 1945; Vivian Rawlins, 1952; William McKenna, 1952; Bobby

Holiday, 1952; Ruth Wheeler, prior to 1958; Viola Hisle, 1951; David Dildine, 1956; Nell Hook, 1943; William F. Brown, Jr., 1952; John Hammond, 1957; Stanley Fizer, 1948; and O. T. Robinson, 1946-1956?

The introduction of said testimony was objected to at the time of introduction by the defendant and did not introduction of said testimony prejudice the jury to the charge of violation involving only the years 1959, 1960, and 1961 and 1962? The failure of the Court to sustain a motion by the defendant whereby the rights of said defendant are protected by the Fourth Amendment to the Constitution of the United States and by the Fifth Amendment to the Constitution of the United States were violated by Internal Revenue agent Harold R. Cook and Internal Revenue agent, Glenn Johnson, who knew at the time of the beginning of their investigation that said Internal Revenue agents were preparing a case for criminal prosecution under the guise of a civil investigation by said Government and the failure to advise said defendant acted to her detriment in violation of her rights as set forth in the Constitution of the United States.

3. The testimony of Glenn Johnson, Internal Revenue agent, that he personally prepared Exhibit No. 81 from the testimony presented in the Court Room during said trial when in fact he did not prepare said Exhibit from the testimony heard in the Court and that said Exhibit No. 81 was compiled, typed and prepared by a staff of the United States Government located in the United States Federal Court House at Lexington, Kentucky during said trial and said testimony by

Agent Johnson was a flagrant violation of the truth and was obviously "hedging" and his testimony to the Court that said errors as set forth in Exhibit No. 81 were apparent and the Court failed in sustaining the motion of the defendant to strike same from the jury.

4. There was ample evidence in the record that the appellant was subjected to questioning by said Internal Revenue Service agents Johnson and Cook which was the equivalent to in-custody questioning. Cf. Miranda v. Arizona, 384 U. S. 436 (1966). Inasmuch as said Internal Revenue Service Agents knew at the time of their questioning of said appellant that she had previously plead guilty to the charge of which they were investigating and had been incarcerated for said offense. The appellant did not abandon the following grounds of reversal before said Court of Appeals but argued only those which were felt to be most pertinent within the time limit. The following schedule of reversible errors were submitted to the United States Court of Appeals by brief and were before said Court at the time of hearing.

5. Did the Court err in failing to sustain the motion of the defendant, properly filed June 3, 1966, for a bill of particulars as designated by the Federal Rules of Criminal Procedure by order of said Court dated June 9, 1966?

6. Did the Court err in sustaining the motion for a directed acquittal of the defendant upon completion of testimony and the presentation of Exhibit No. 81 to the Court when said Exhibit No. 81 did not comply with the order entered May 23, 1966 by said Court

establishing the beginning net worth of the defendant as of December 31, 1958 to be $85,238.92 when in fact, Exhibit No. 81 of the Government allegedly compiled during the trial of said case was of a substantial lesser amount as of December 31, 1958? The order of said Court entered May 23, 1966 and pursuant to said order, Item C the living expenses as set out for the years 1960, 1961, and 1962 are of a variance for each of the respective years from that of alleged Exhibit No. 81 of the Government. Therefore, the motion by the defendant should prohibit the introduction of the Government's Exhibit No. 81 and should have been sustained.

7. a. Should the motion for acquittal at the completion of the testimony have been sustained by the Court as to Count I of the charge set forth that the defendant allegedly had taxable income for the year 1959 in the sum of $36,790.05 when in fact Exhibit No. 81 of the Government asserts a taxable income of $37,214.34?

b. Should the motion for acquittal at the completion of the testimony have been sustained by the Court as to Count II of the charge which set forth that the defendant allegedly had taxable income for the year 1960 in the sum of $30,472.13 when in fact Exhibit No. 81 of the Government asserts a taxable income of $31,009.80?

c. Should the motion for acquittal at the completion of the testimony have been sustained by the Court as to Count III of the charge which set forth that the defendant allegedly had taxable income for the year 1961 in the sum of $31,165.80 when in fact

Exhibit No. 81 of the Government asserts a taxable income of $31,624.79?

d. Should the motion for acquittal at the completion of the testimony have been sustained by the Court as to Count IV of the charge which set forth that the defendant allegedly had taxable income for the year 1962 in the sum of $26,514.98 when in fact Exhibit No. 81 of the Government asserts a taxable income of $26,855.67?

8. Did the Court err in sustaining a motion to suppress evidence offered before the jury and documents received from U. G. Briscoe?

9. Did the Court err in failing to sustain the motion of the defendant to prohibit the United States Government from having two (2) United States Internal Revenue agents to stay in the Court Room and listen to the testimony during the trial for the preparation of a summation?

10. The failure of the Court to direct that the said books and records of the defendant were adequate and sufficient to comply with the United States Code in all matters pertaining to income tax as testified to by the Certified Public Accountant, John A. Roberts, for the defendant.

11. The introduction of testimony of a witness named Laura Mae Stockton for the purpose of prejudicing the position of the defendant when in fact the testimony by said Laura Mae Stockton was so pungent to the moral conduct of the American people and the testimony by said Laura Mae Stockton did not or could not have reflected upon the net worth statement as the

testimony of said Laura Mae Stockton was not at the beginning nor at the ending of a taxable period. That said testimony was introduced for the moral purpose of affecting or prejudicing the jury and in fact the United States Government did know that said Laura Mae Stockton had testified against the defendant herein and that said woman, Stockton, who stated under oath that she was a prostitute, was either morally deranged or a person not to be believed.

That said Glenn B. Johnson, Internal Revenue Agent, had, prior to the trial, submitted a report dated June 15, 1964 to the District Director of Internal Revenue Agency, Chief of Intelligence Division, Louisville, Kentucky, re: Ethel M. Beal, 6-45-41-001-1-1 Final, Exhibit No. 33, and said report by Agent Johnson indicated that said agent knew the testimony of said Stockton and that said testimony in no way would reflect in the mathematical computation of Exhibit No. 81, the alleged summation of the testimony, nor would said testimony do anything but inflame the jury to the prejudice of the defendant whether said testimony being true or false. It was obvious to all present that the testimony of said Stockton would act to inflame and did inflame the attitude of said jury.

STATUTES INVOLVED.

United States Section 7201, Internal Revenue Code 26 USC, Section 7301; Fourth Amendment to the Constitution of the United States; Fifth Amendment to the Constitution of the United States.

CONSTITUTION OF THE UNITED STATES

"FOURTH AMENDMENT

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

"FIFTH AMENDMENT

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT.

The appellant herein was indicted by the United States Jury, Covington, Kentucky, September 28, 1965, and charged with violation of Section 7201, Internal Revenue Code 26 USC, Section 7201, for allegedly preparing, signing, and depositing for mailing in the Eastern District of Kentucky false and fraudulent tax returns for the years in Count I, 1959; Count II, 1960; Count III, 1961, and Count IV, 1962.

REASONS FOR GRANTING THE WRIT.

1. The defendant properly and timely filed a motion for said Court requesting that a bill of particulars be presented to said defendant in order that said defendant could adequately and properly prepare her defense. Said motion was overruled by this Court to the detriment of the appellant. The Court held that the defendant was not entitled to said bill of particulars when Rule 7(f) of the Federal Rules of Criminal Procedure, 1966 sets forth that a defendant may request a bill of particulars. In the instant case, the Court said "no" when in fact the answer of said question should have been "yes". The action of said Court acted to the detriment of the appellant herein.

2. The appellee failed to establish the beginning net worth as of December 31, 1958 in the sum of $85,-238.92 contrary to the order entered in said action by the Court dated May 24, 1966. The failure of the appellee to comply with the order entered in said action and the failure of the Court to prohibit the introduction of Exhibit No. 81 prepared by the appellee was to the detriment of the appellant. The failure of the appellee to comply with the order of May 24, 1966 setting forth the living expenses to be charged to the defendant in the sum of $2,114.16 in 1960; $2,902.45 in 1961; and $4,840.63 in 1963 indicated that the Exhibit No. 81 did not comply with said order and same should have been stricken from the view of the jury. The presentation of said exhibit with the obvious errors acted to the detriment of the appellant.

3. Upon the computation of the testimony and the presentation of Exhibit No. 81 by the appellee, motion was properly made requesting an acquittal on Counts I, II, III, and IV of the indictment based upon the fact that in each of the respective years, 1959, 1960, 1961 and 1962, the alleged Exhibit No. 81 of taxable item No. 37, taxable income, set out therein was at a variance with the amounts set forth in the indictment for each of the respective years in substantial amounts and that said Exhibit No. 81 not being in compliance with the original indictment should have been stricken and not presented before the jury and that the presentation of said exhibit was detrimental to the appellant herein.

4. The appellant herein did not receive a fair and impartial verdict because a member of the jury, James B. Ledford, who improperly answered on page 29* of the Voir Dire Examination of the Jury that he was not acquainted with the defendant, Mrs. Beal, by "shaking his head in the negative" when in fact said juror had stayed in the hotel operated by the appellant on May 14, 1967 or less than one (1) month from the time of trial of this case; that said juror did not truthfully and honestly reveal to the Court and to the attorneys for the defendant his acquaintanceship with the defendant and her husband; that said failure by the juror clearly indicated that in the instant case he was not being fair to the Court or to the defendant nor that said juror could render a fair and impartial verdict

*All following page numbers are from the original Transcript of Evidence and Proceedings of this case.

either for or against the defendant; that said juror, James Ledford, states on page 30 of the Voir Dire Examination of the Jury at the time of trial of this action and while he was sitting in judgment of the appellant herein that at the time that he was under an examination by the United States Government growing out of tax matters and that the pressure of said immediate examination by the juror, James Ledford, placed upon him such "exacting" pressures that he had no choice but to find the defendant guilty regardless of the testimony presented for said jury—a human nature being what it is—trusting or hoping that his action in the instant case would act to his personal betterment when in fact the examination of the juror's personal present income tax problems was under the direct supervision of Anthony J. Roche, the Supervisor of the Internal Revenue Service Lexington office at Lexington, Kentucky. That said juror knew that Mr. Roche, as Supervisor of the Internal Revenue Service Lexington office, and Glenn B. Johnson, Special Agent of the Lexington office, could have tremendous influence upon the controversy now under consideration between said juror, Ledford, and the United States Government.

The Court should feel that the appellant herein, under no circumstances, could receive a fair and impartial verdict by the same said James Ledford when he falsely answered the question propounded to him by the Court while he was under a personal investigation of his tax matters by the United States Government.

5. The motion was properly made by the appellant (Testimony, pp. 92-98-118), that any document obtained from U. G. Briscoe by Mr. Glenn Johnson and Mr. Harold Cook prior to March 23, 1964, the date of a summons served by said Internal Revenue agents upon Mr. Briscoe be suppressed. The failure of the Court to sustain the motion acted to the detriment of the appellant when in fact U. G. Briscoe was personally acquainted with the appellant and had obtained, as her Certified Public Accountant, certain confidential information pertaining to her matters and that said U. G. Briscoe and Harold Cook and Glenn Johnson knew or should have known at the time of the various meetings they were preparing to the detriment of said appellant. Said Briscoe voluntarily made available to Johnson and other agents, without the knowledge or consent of this defendant, any records or papers they may have had pertaining to said defendant (Testimony, p. 119), and that said action by the Certified Public Accountant was in direct violation of his confidential and professional relationship with the appellant and acted to her detriment.

6. The defendant properly made a motion before the Court to the United States having in the Court room two (2) Internal Revenue agents, both of whom would testify at the summation of the trial (Testimony, pp. 1-6). The United States Government was entitled to only one cooperating assisting Internal Revenue agent to stay in the Court Room to aid and guide through the prosecution of said case and the action of the Court by allowing two agents to listen to the testi-

mony presented into Court and for said agents to compile or attempt to compile information which eventually wound up in Exhibit No. 81 of the Government, despite the erroneous testimony of one Internal Revenue agent, namely Glenn Johnson, acted to the detriment of said appellant. That the motion to exclude from the Court Room those who did and were able to consult and advise a staff in the preparation of Exhibit No. 81 acted to the detriment of the appellant. That said motion of the appellant should have been sustained.

The Court acted in accordance with the Civil Rules when in fact the instant case involved a criminal prosecution and the Court should be held to more stringent control in the taking or the possible taking of the time and life of an individual than in taking merely their estate.

7. The Court clearly indicated and directed that the United States should be limited in the presentation of the facts involved in this matter to the years 1959, 1960, 1961 and 1962. Despite the objection by the appellant and the introduction of testimony pertaining to same, the United States introduced testimony by witnesses of matters beyond the scope of this trial which occurred many years prior to the matter of consideration by this Court, particularly the testimony of Solly Hall, page 301, 1954; W. B. Walker, page 341, 1949; Vivian Rawlins, page 345, 1952; William McKenna, page 346, 1952; Bobby Holiday, page 349, 1952, Ruth Wheeler, page 343, prior to 1958; Viola Hisle, page 356, 1950 and 1951; David Dildine, page 408, 1956; Nell

Hook, page 409, 1943; William F. Brown, Jr., page 411, 1952; John Hammond, page 416, 1957; Stanley Fizer, page 418, 1948; O. T. Robinson, pages 421-425, 1947, 1950, 1953, 1954.

By introduction of said testimony of matters not involved in this action, the United States completed flagrant errors in violation of the proper conduct of this trial and in direct violation of the orders of the Court.

8. Glenn B. Johnson, Internal Revenue agent in the Internal Revenue Service (Testimony, pp. 457-510) obviously shaded his testimony or attempted to be not straight forwardly answering the questions propounded to said agent pertaining to the books and records of said defendant after he stated (Testimony, p. 520) that the defendant did not have books and records sufficient to ascertain the income for tax purposes when in fact testimony following same statement indicated that said agent Johnson was testifying incorrectly after he was presented the ledger sheets, the income operating statements, the expense and income operating statements of the properties of the defendant including ledger sheets, books, cancelled checks, bank statements, when in fact the agent testified that he was "lying" in his previous testimony that the appellant did not have books. It was obvious by the testimony by Agent Johnson (Testimony, p. 522) in answer to the question, "I have records that fit that description, but those records were not the original records," when in fact the agent did know that the records presented to him at the trial of the defendant were the records that he had had in

his personal possession and that he had returned to Mr. John Core, one of the attorneys for the defendant, and received a receipt for the documents dated April 4, 1964 (Testimony, p. 526) when the agent Johnson answered (page 526) "I remember sheets similar to these, I can not recall if these are actually the sheets I had."

It was obvious by the answer of Agent Johnson that he was not responding and attempting to be truthful in answering the questions. Agent Johnson stated (Testimony, p. 528) that agent Cook had certain records of the defendant and that he (agent Johnson) had received the records of the defendant approximately June 18, 1963 and that he had returned the various records to Mr. Core on April 6, 1964 (Testimony, p. 528). That the taking of the records of the defendant by agent Cook and/or agent Johnson was a direct violation of the Fourth Amendment to the Constitution of the United States which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is obvious from the testimony of agent Johnson (Testimony, pp. 528-532) that the illegal taking of the books and records of the appellant herein constitutes a direct violation under the guise of his official position of the Constitutional rights of this appellant.

9. Agent Johnson testified that he compiled Exhibit No. 81 presented to the Court constituting the testimony of some fifty-two (52) witnesses and from said personal work he was able to compile the exhibit which is utterly ridiculous.

On the first day of testimony by Glenn B. Johnson he testified that "he prepared Government Exhibit No. 81." Upon returning to Court the following day (Testimony, p. 570) Mr. Johnson obviously answered the question:

> "Q. Mr. Johnson, referring to Government Exhibit No. 81, if I understood you yesterday you stated to this jury that the statement of net worth of Ethel and Raymond Beal as set forth in this exhibit was prepared by you on the testimony heard during this trial in this Court Room? Is that what you said?
>
> A. That is correct.
>
> Q. Now, I will ask you if you prepared that statement yourself or someone else prepared it from the information and the testimony in this courtroom?
>
> A. This report was *prepared by me* or *under my supervision.*
>
> Q. Now, you are changing your testimony as to who prepared it. Did you prepare it or did someone else prepare it during this trial?
>
> A. This report was prepared by me or under my supervision.
>
> Q. In other words, when you testified yesterday that you prepared that report, that was not true?
>
> A. I—in the preparation of this report, I verified every figure that is on this report, checked and

test checked, and under my supervision there were various test checks made test my checking, and I would say that this report was prepared by me with some supervision—with some help, under my supervision."

It is obvious from the testimony of Johnson that he did not tell the truth on the previous pertaining to Exhibit No. 81; that his testimony was not to be believed in any matter when in fact by virtue of his position as an Internal Revenue agent it was his duty to testify only to the truth regardless of whom it hurt and obviously he shaded his testimony pertaining to Exhibit No. 81 when he testified one day and returned the following day after thinking the answer over through an evening.

The testimony before a jury by a person in the position as a special agent in the Internal Revenue Department or the Government should be beyond any question of fact a true telling of the truth. Upon the completion of the testimony by this agent, the Court erred by not sustaining a motion for acquittal on all Counts of the indictment. If Johnson will testify improperly as to one item or one matter of which he is personally acquainted and knows the answer to a jury, his testimony should not be allowed and should be stricken and the Court should have immediately granted the motions of the appellant. It is interesting to note that the income tax returns for each of the respective years, 1959, 1960, 1961 and 1962 which were the basis of the indictment and charges herein and the recommendation of the Special Agent, Johnson, that in each

of the respective years the returns filed were joint income tax returns filed by both this defendant and her husband, Raymond Beal; that the Special Agent, Johnson, knew and knows that Raymond Beal as well as Ethel Beal were jointly and severally liable for the preparation of false and fraudulent returns but he did not recommend in his report to his Supervisor nor in the presentation of the evidence before the Grand Jury that Raymond Beal, the husband of the appellant, filed a joint return, Form 1040, for each of the respective years and if said appellant was guilty, why did Special Agent Johnson not recommend the indictment of said Raymond Beal, her husband.

This clearly indicates a pre-determined attempt to prosecute only the wife in view of his recommendation of June 15, 1965, and in said report he is attempting to and did as a result of his investigation of the appellant herein indicted for the violation of certain matters which are not in violation of the Federal laws. Why, if Mr. Johnson was attempting to be fair and impartial did he fail to recommend, instigate, or request prosecution of the co-signer and filer of the tax returns for the years 1959, 1960, 1961 and 1962?

10. The United States Government introduced as a witness (Testimony, p. 451) a person's testimony for the sole purpose of exciting, impairing or inflaming the prejudices of the jury against the defendant when in fact the Internal Revenue agent, Glenn B. Johnson, knew from his record and report heretofore mentioned that the testimony of Laura Mae Stockton (Testimony, pp. 451-457) in no way affected the charge and the basis

of the determination of the error in income tax computation.

Inasmuch as the testimony by said witness for the Government allegedly involved three weeks in 1962 or 1963, the testimony being made clear by either the witness or the questions asked by the government wherein said witness was testifying under oath that she was a prostitute, it was apparent from the testimony that she is a person either mentally deranged, unbelievable, or a paid informant testifying to facts which in no manner or no way reflected upon the matter before the Court. The testimony of said witness was so repulsive that the attorneys for defendant did not question the witness. Said Special Agent Johnson knew the effect of said testimony and as an expert accountant knew that in no manner would her testimony affect the net worth, the basis of the alleged claim charged.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEALS
(Filed November 26, 1968)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18474

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

ETHEL M. BEAL, - - - - *Defendant-Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY,
AT LEXINGTON.

Decided November 26, 1968.

Before: EDWARDS and COFFIN,* Circuit Judges, and CECIL, Senior Circuit Judge.

PER CURIAM. Appellant Beal was indicted for filing false and fraudulent income tax returns in each of four years—1959, 1960, 1961 and 1962—in violation of 26 U.S.C. § 7201 (1964). The government served notice that it intended to proceed by net worth proofs to show understatement of income by over $51,000 and understatement of tax by over

*Hon. Frank M. Coffin, United States Court of Appeals for the First Circuit, sitting by designation.

$21,000 in the four disputed years. The case was tried to a jury before the United States District Court for the Eastern District of Kentucky and appellant was found guilty on all counts and was thereafter sentenced to probation and a $2,500 fine on each count.

On appeal appellant's counsel listed ten separate claims of reversible error, but at oral argument largely abandoned all except numbers IV, VII and VIII.

As to appellant's question IV, wherein she asserts that she was deprived of a fair trial by undisclosed prior contact of one juror with her and her hotel, we have examined the appellate record and find it devoid of facts upon which appellant seeks to rely. Clearly, the claim was not advanced at trial and apparently no record was made pertaining to this issue on motion for new trial. If this evidence is newly discovered evidence, it cannot be asserted first at appellate hearing. See FED. R. CRIM. P. 33.

As to questions VII and VIII, appellant asserts that the District Judge erred in failing to suppress prior to trial, and by admitting at trial, certain evidence derived from appellant's accountant and from appellant herself. Appellant relies generally on the Fourth and Fifth Amendments in this regard. We have examined the entire record in this regard and find no constitutional violations or reversible error.

Appellant appears to concede that information derived from appellant's accountant was voluntarily made available to the Internal Revenue Service agents. The record does not show surrender of appellant's own books and records, as opposed to the accountant's own books and records. Appellant's tax returns for these disputed years had not been subjected to prior audit. Cf. Hinchcliff v. Clarke, 371 F. 2d 697 (6th Cir. 1967).

Nor is any issue presented (or found in the record) which would show such violations pertaining to information

derived from appellant herself. The examination of appellant's records was authorized by statute. 26 U.S.C. § 7602(1) (19[illegible]). The District Judge found (on ample evidence) that appellant turned over her records without coercion or promise. See Eggleton v. United States, 227 F. 2d 493 (6th Cir. 1955), cert. denied, 352 U.S. 826 (1956); Zap v. United States, 328 U.S. 624 (1946), rehearing denied, 329 U.S. 824, vacated and remanded on other grounds, 330 U.S. 800 (1947). There is no indication in this record that appellant was ever subjected to in-custody questioning. Cf. Miranda v. Arizona, 384 U.S. 436 (1966).

We have also examined the other six issues advanced on this appeal and find no reversible error.

Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 873

ETHEL M. BEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 21-23) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1968 (Pet. 21). The petition for a writ of certiorari was filed on December 23, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether petitioner was deprived of a fair trial because a bill of particulars was denied; because the net worth proof of income varied slightly from the figures stated in the indictment and specified prior to trial; because one juror denied knowing petitioner and was himself under tax investigation; because evidence received from a certified public accountant was not suppressed; because two Internal Revenue agents were allowed to be in the court room throughout the trial; because the value of assets was shown by reference to years antedating the indictment period; because of the use at trial of records turned over by petitioner to the revenue agents; because a revenue agent allegedly testified falsely; or because relevant evidence revealed that petitioner received income from prostitution.

STATEMENT

Petitioner was indicted (R. 1)[1] in four counts for willful attempted evasion of income taxes, in violation of Section 7201 of the Internal Revenue Code of 1954, by the filing of false income tax returns for the years 1959 through 1962. The government's proof of income was by the net worth method and the jury found petitioner guilty on all four counts. Petitioner received a

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[1] "R." references are to the "Certified Record on Petition for Writ of Certiorari"; the page numbering of this record assigns a single number to each document, rather than to each page. "Tr." will be used to refer to the 3-Volume Transcript of Trial Proceedings, and "Supp. Tr." to refer to a "Supplemental Transcript" of proceedings on motion for new trial.

suspended two year sentence and a fine of $2,500 on each count and was placed on probation for two years. (R. 38.) The court of appeals affirmed *per curiam* (Pet. 21-23).

ARGUMENT

Petitioner presents (Pet. 9-19) the same ten claims of error which she presented by brief in the court of appeals, where at oral argument her counsel "largely abandoned" (Pet. 22) all the grounds except three, which now constitute her points 4, 5, and 8 (Pet. 10-12, 14-15). None of the grounds advanced has any substance.

1. The granting of a bill of particulars is a matter resting largely in the discretion of the trial court, and a denial of particulars does not call for reversal unless the defendant can show surprise or prejudice. See *Wong Tai* v. *United States*, 273 U.S. 77; *Ross* v. *United States*, 374 F. 2d 97 (C.A. 8). Here, the indictment (R. 1) stated figures for petitioner's correct income and tax. The government, in compliance with the court's order (Tr. 85-86), notified petitioner's counsel before trial (R. 20) that proof of income would be by the net worth method and gave figures for petitioner's beginning net worth and for her estimated living expenses. Petitioner asserts that the denial of further particulars was to her "detriment" (Pet. 9), but fails to explain how she was either surprised or prejudiced. Thus, no ground for reversal appears.

2. By letter dated May 24, 1966, the United States Attorney advised petitioner's counsel that the government's figure for beginning net worth was $85,238.92

(R. 20). The evidence at trial, as reflected in the government's net worth computation (Govt. Ex. 81), showed a beginning net worth of $80,658.71. This variation is to be compared with the allegation and proof of over $50,000 of unreported income (R. 1; Govt. Ex. 81). Minor variations of this order are a commonplace in net worth cases and are not a ground for reversal. See *United States* v. *Costello*, 221 F. 2d 668 (C.A. 2), affirmed, 350 U.S. 359; *White* v. *United States*, 216 F. 2 1, 5 (C.A. 5); *Tinkoff* v. *United States*, 86 F. 2d 868, 878 (C.A. 7). Petitioner, similarly, asserts (Pet. 9) a variation between her living expenses as predicted and as proved, but the respective variations are inconsequential, being less than 5 percent in amount for each year (R. 20; Govt. Ex. 81).

3. Petitioner (Pet. 10) moved for acquittal because of variations between her taxable income as charged in the indictment (R. 1) and as proved at trial (Govt. Ex. 81). This claim of error is frivolous, since no surprise or prejudice could have resulted from the trifling variations involved. See *United States* v. *Costello*, *supra; United States* v. *Albanese*, 224 F. 2d 879, 882 (C.A. 2), certiorari denied, 350 U.S. 845.

4. Petitioner contends (Pet. 10-11) that she was denied a fair trial because a juror (James B. Ledford) denied, on *voir dire*, that he was acquainted with petitioner and her husband and because this juror was himself the subject of a tax examination. Petitioner raised these same questions before the district court on motion for new trial (Supp. Tr. 1-22). At the hearing on that motion, the juror testified that he knew

petitioner's husband as "Raymond" but did not know the husband's last name, that he was not acquainted with petitioner, and that the name "Beal" did not "register" when he was questioned prior to trial (Supp. Tr. 9-11). As for his own involvement in a tax examination, he revealed that fact on *voir dire* and stated that he would not be swayed one way or the other in consequence (Supp. Tr. 19-20). On the motion for new trial, the district court reminded petitioner's counsel that he could have challenged this juror for cause, but failed to do so, and concluded, in any event, that the juror had been impartial (Supp. Tr. 21-22).

5. Petitioner contends (Pet. 12) that the trial court should have suppressed evidence and documents obtained by Internal Revenue agents from a certified public accountant *before* March 23, 1964, because the accountant, who had prepared her tax returns, violated his confidential relationship with petitioner by permitting the agents to examine his files without obtaining her permission. However, petitioner concedes that the accountant could properly have disclosed his records without her permission *after* March 23, 1964, when an Internal Revenue summons for testimony and documents was served on him (Tr. 533). In any event, no constitutional rights of petitioner were violated merely because a certified public accountant permitted revenue agents to see *his* files, nor was there any breach of any common law privilege of confidentiality, since no such privilege attaches to disclosure to an accountant. See *Falsone* v. *United States*, 205 F. 2d 734 (C.A. 5), certiorari denied, 346 U.S. 864; *Col-*

ton v. *United States*, 306 F. 2d 633 (C.A. 2); *Gariepy* v. *United States*, 189 F. 2d 459 (C.A. 6); *Zimmermann* v. *Wilson*, 105 F. 2d 583 (C.A. 3); *Sale* v. *United States*, 228 F. 2d 682, 686 (C.A. 8); *Olender* v. *United States*, 210 F. 2d 795 (C.A. 9); cf. *Wilson* v. *United States*, 221 U.S. 361, 376-380; *United States* v. *White*, 322 U.S. 694, 698-699.

6. The trial judge granted the government's request that two Internal Revenue agents be permitted to remain in the court room during the trial, on the ground that both were needed in view of the voluminous exhibits involved (Tr. 1-4). The ruling was discretionary, and no resulting prejudice appears.

7. Petitioner contends (Pet. 13-14) that testimony concerning transactions which occurred long before the 4-year period covered by the indictment was improperly received. The testimony was, however, clearly relevant to the issues in the case. For example, Solly Hall testified that petitioner bought a house in 1945 for $15,750 (Tr. 302), and this figure appears in the government's net worth computation (Govt. Ex. 81) for this asset at the opening date, December 31, 1958. Similarly, W. B. Walker testified concerning additions and improvements to this real estate (Tr. 340-343).

8. Petitioner asserts (Pet. 14-15) that Agent Johnson was "lying" when he testified that petitioner's records were inadequate to show her correct income. The jury's verdict is a sufficient denial of this assertion. Petitioner also alleges (Pet. 15) that Agent Cook or Agent Johnson illegally seized her records. The district court, after hearing evidence on the point

(Tr. 379-400), found that petitioner voluntarily complied with a request to see her records (Tr. 406). The evidence clearly supported that finding.

9. Petitioner's contention (Pet. 16-18) that Agent Johnson must have prevaricated, because he first said that he prepared government Exhibit 81 (the net worth computation) and later that it was prepared under his supervision, is frivolous, as is the contention (Pet. 18) that it was invidious to prosecute only petitioner and not her husband.

10. Petitioner is mistaken in stating that a prostitute's testimony was introduced for the purpose of prejudicing the jury. The witness testified (Tr. 451-457) that in 1962 she and others worked as prostitutes at petitioner's hotel and shared their earnings with petitioner. Obviously it was relevant to show a likely source of unreported income, especially in response to petitioner's theory that all her income could be found in the records of her hotel business. See *Holland* v. *United States*, 348 U.S. 121, 137-138.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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